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Supreme Court, U.S.
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IN THE

Supreme Court of the United States

October Term, 1977

No. 77-

UNITED FEDERATION OF TEACHERS
WELFARE FUND,

Petitioner,

vs.

STATE HUMAN RIGHTS APPEAL BOARD and
STATE DIVISION OF HUMAN RIGHTS on the
Complaint of PHYLLIS R. GOODKIN,

Respondents.

On Petition for a Writ of Certiorari to the Court of Appeals of the State of New York

BRIEF FOR RESPONDENT STATE DIVISION OF HUMAN RIGHTS IN OPPOSITION

ANN THACHER ANDERSON
General Counsel
State Division of Human Rights
Attorney for Respondent
State Division of Human Rights
2 World Trade Center
New York, New York 10047
(212) 488-7650

JOANN TREZZA
Of Counsel

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Question Presented

In view of the inapplicability of the Employee Retirement Income Security Act of 1974 to matters antedating January 1, 1975, and in view of provisions in the Civil Rights Act of 1964 which preserve State fair employment legislation providing more comprehensive protection to

employees than what is afforded by Title VII, was the New York Court of Appeals correct in letting stand a decision of the Appellate Division* requiring provision to a female employee who gave birth in 1971 of a $50.00 obstetrical benefit provided by petitioner to male employees whose wives give birth?

Statement of the Case

Petitioner would have this Court review application of New York's fair employment legislation, N.Y. Executive Law Art. 15 (McKinney's 1972), hereinafter "the Human Rights Law", to a New York-based employer and contracting labor organizations which disallowed to a female employee who gave birth in 1971 a $50.00 obstetrical benefit routinely provided male employees whose wives give birth. Although the facts of the case date back to 1971, petitioner perceives a conflict with the Employee Retirement Income Security Act of 1974, 88 Stat. 832, 29 U.S.C. §§1001 *et seq.* (ERISA). Although the Civil Rights Act of 1964, 78 Stat. 241, 42 U.S.C. §§2000a *et seq.*, recognizes and preserves State fair employment legislation providing more comprehensive protection to employees, petitioner perceives a conflict with Title VII, 42 U.S.C. §§2000e-1 *et seq.*, and with decisions of this Court, sufficient to raise a question under the Supremacy Clause, U.S. Const. Art. VI cl. 2.

The Division respectfully submits, for the reasons set forth below, that petitioner does not raise a substantial Federal question warranting certiorari.

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* *United Federation of Teachers Welfare Fund* v. *State Human Rights Appeal Board*, 59 App. Div. 2d 826, —— N.Y.S.2d —— (1st Dept. 1977), *appeal denied*, 44 N.Y.2d 641, —— N.E.2d —— (1978).

Reasons Certiorari Should Be Denied

I. Petitioner raises no substantial question under ERISA.

Petitioner relies on footnote #1 in *Malone* v. *White Motor Corp.*, —— U.S. ——, 55 L. Ed.2d 443, 447 (1978) to substantiate its argument that the New York Court of Appeals erred in refusing to grant its motion to appeal. That footnote, after stating that ERISA is a comprehensive Federal regulation pre-empting state laws, goes on to say that "ERISA did not become effective until January 1, 1975, and expressly disclaims any effect with regard to events before that date. . . ." This language recapitulates 29 U.S.C. §1144(b), providing that ERISA does not apply to causes of action which arose before January 1975.

The cause of action in this case accrued in 1971, when the complainant was disallowed the $50.00 obstetrical benefit provided by petitioner and the Board of Education of the City of New York to male employees whose wives give birth. ERISA has no pre-emptive effect.

But even if ERISA did apply, it would not necessarily pre-empt application of the Human Rights Law in this case. ERISA contains a nonimpairment clause indicating Congressional intent to permit application of State fair employment legislation:

> "Nothing in this subchapter shall be construed to alter, amend, modify, invalidate, impair, or supersede any law of the United States (except as provided in sections 1031 and 1137(b) of this title) or any rule or

regulation issued under any such law." 29 U.S.C. §1144(d).

Title VII is not mentioned in 29 U.S.C. §§1031, 1137(b), and therefore continues in full force and effect.

No distinction is made in ERISA between the substantive provisions of Title VII, 42 U.S.C. §§2000e-2, 2000e-3, and the numerous provisions recognizing and preserving State and local fair employment legislation and deferring to the jurisdiction and remedial power of agencies enforcing such legislation, 42 U.S.C. §§2000e-4(f)(1), 2000e-5(b)-(e), 2000e-7, 2000e-8(b); §2000h-4. The non-impairment clause of ERISA preserves Title VII in its entirety, including provisions permitting enactment and application of more stringent State statutes.

During debate on ERISA, an amendment was offered to add a clause prohibiting discrimination. The amendment was dropped after reference was made to the applicability of the prohibitions in Title VII. 119 *Cong. Rec.* 30409-10 (Sept. 19, 1973); 120 *Cong. Rec.* 4726 (Feb. 28, 1974).

Rejection by Congress of a nondiscrimination clause in ERISA, and Congressional reliance, in the drafting and enactment of ERISA, upon Title VII and its provisions acknowledging and preserving State fair employment legislation appear to place a heavy burden upon those who would argue that States should have no role in eliminating discrimination in employee benefit plans. See Feerick, "Labor Relations—Birth of a Child," N.Y.L.J. June 3, 1977 p. 1 col. 1 at 26 col. 3. The Division respectfully submits that this is not a case in which that burden can be discharged.

II. Petitioner raises no substantial question under Title VII.

Petitioner cites *Geduldig* v. *Aiello*, 417 U.S. 484 (1974), *General Electric Co.* v. *Gilbert*, 429 U.S. 125 (1976), and *Social Service Employees Union, Local 371* v. *Women in City Government United*, 429 U.S. 1033 (1977) to justify its withholding from female employees the obstetrical benefit provided for male employees whose wives give birth. Those cases are not in point.

Aiello upholds under the Equal Protection Clause of the Fourteenth Amendment a California statute excluding disabilities connected with normal pregnancy from coverage of an employee-funded program of disability benefits. In a footnote which is frequently cited and quoted, this Court took care to point out that State legislatures are constitutionally free to include or exclude pregnancy from the coverage of such legislation on any reasonable basis, just as with respect to any other physical condition. 417 U.S. at 496 n. 20. Under *Aiello*, therefore, State fair employment legislation may constitutionally be applied to protect pregnant workers from disallowance of employee benefits paid to men.

Gilbert holds that an employer does not discriminate as to sex in violation of Title VII by excluding pregnancy-related disabilities from fringe benefits provided for other disabilities. The issue here is different. Petitioner provides an obstetrical benefit but only to employees "in active status." Since most female employees are on leave and in inactive status at the time they give birth, and most male employees are in active status at the time their wives

give birth, most female employees are prevented by petitioner from receiving a benefit available to most appropriately circumstanced male employees. Even if this Court were to equate the issue here with the issue in *Gilbert*, however, it could not hold that Title VII controls and restricts interpretation of the Human Rights Law. Title VII not only recognizes and preserves State fair employment legislation, but permits such legislation to provide more protection, and more stringent sanctions, than Title VII itself. When the state statute permits what Title VII prohibits there is conflict and Title VII will pre-empt and supersede. 42 U.S.C. §2000h-4. But when the state statute prohibits what Title VII permits there is no preemption. 42 U.S.C. §2000e-7. States remain free, after as before enactment of Title VII, "to extend the area of non-discrimination beyond that which the Constitution itself exacts", Frankfurter, J., concurring, in *Railway Mail Association* v. *Corsi*, 326 U.S. 88, 98 (1945).

The *Women in City Government* case, to which petitioner was a party, does not indicate that certiorari should be granted in this case. The issue in that case resembles the issue in *Gilbert*, not the issue here. Even if this Court should perceive a Federal question in the determination of the New York courts to apply the Human Rights Law more stringently than this Court saw fit to apply Title VII, this is not the appropriate case for review. To disallow to female employees a benefit available to appropriately circumstanced male employees is too plainly discriminatory to warrant consideration by this Court.

Conclusion

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Dated: New York, N.Y.
July 19, 1978

Respectfully submitted,

Ann Thacher Anderson
General Counsel
State Division of Human Rights
Attorney for Respondent
State Division of Human Rights
2 World Trade Center
New York, New York 10047
(212) 488-7650

Joann Trezza
Of Counsel

307 BAR PRESS, Inc., 132 Lafayette St., New York 10013 – 966-3906

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